INDEX.

PAGE

I. The "Findings and Opinion" of the Commission do not afford a substantial basis for a conclusion that the structure and existence of American inequitably distribute voting power among the security holders of its own system or unduly or unnecessarily complicate its own system 2

Preliminary 3

The Issue Framed by the Commission: Bond and Share 4

American: A Holding Company System by Itself 5

II. The Government brief does not show that dissolution of American was the proper or justifiable remedy to accomplish the purposes of the Act 15

No Power of Dissolution 17

III. The Government does not meet the argument that Section 11(b)(2) is unconstitutional 19

(A) The difficulties with the Act under the Interstate Commerce provision are not met by the Government brief 20

(B) The Government does not show that dissolution is not a taking or that the taking does not involve damage 21

(C) The Government does not meet the argument that the statute fails to establish standards for administrative action 22

Cases Cited

PAGE

Addison v. *Holly Hill Co.*, 322 U. S. 607 (1944) 19

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515 (1945) 13

Electric Bond and Share Company v. *Securities and Exchange Commission*, 303 U. S. 419 (1938) 20

Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 (1935) 21

National Broadcasting Company v. *United States*, 319 U. S. 190 (1943) 23

Otis & Co. v. *Securities and Exchange Commission*, 323 U. S. 624 (1945) 16

Perry v. *United States*, 294 U. S. 330 (1935) 22

Schechter Poultry Corp. v. *United States*, 295 U. S. 495 (1935) 25

Securities and Exchange Commission v. *Chenery Corporation*, 318 U. S. 80 (1943) 13

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499 (1935) 13

United States v. *General Motors Corporation*, 323 U. S. 373 (1945) 22

Holding Company Act Releases

In the Matter of Electric Bond and Share Company, Holding Company Act Release No. 4305, May 19, 1943 16

In the Matter of Electric Bond and Share Company, Holding Company Act Release No. 5970, Aug. 6, 1945 16

Statutes

Investment Company Act (54 Stat. 789-847; 15 U. S. C. §§80a-1—80a-52) 14

Public Utility Holding Company Act (49 Stat. 803-838; 15 U. S. C. §§79-79z) ..... *passim*

Supreme Court of the United States

OCTOBER TERM, 1945

No. 69

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONER.

It is respectfully urged that the brief for the Government does not meet the constitutional and other difficulties with the statute and order pointed out in our main brief. What bulks large in the Government brief is a statement of evils sought to be remedied by the Public Utility Holding Company Act, and the assertion of the existence of some of them in the Electric Bond and Share system. The question presented here, however, is not of these evils but rather of the constitutional and legal status of the novel remedy sought to be applied under the Act.

The points in the brief for the Government are:

I. The Commission properly found that the corporate structure and existence of Petitioner unduly and unnecessarily complicate the structure of the Electric Bond and Share holding company system and unfairly and inequitably distribute voting power among the security holders of that system..... 35

II. In the light of the Commission's findings, the remedy of dissolution is proper 94

III. Section 11 (b) (2) of the Act is constitutional 140

In opposition the following is submitted:

I.

The "Findings and Opinion" of the Commission do not afford a substantial basis for a conclusion that the structure and existence of American inequitably distribute voting power among the security holders of its own system or unduly or unnecessarily complicate its own system.

As appears from the statement of the first proposition of the Government, and indeed from the substance of the entire brief of the Government, the attempted justification of the order of the Commission directing dissolution of Petitioner (American) is based upon the effect of American in the *Bond and Share* holding company system. Most of the lengthy factual statement and discussion in the brief is directed to criticism of Bond and Share and its past acts, and to urging the inconsistency of the Bond and Share set-up with the objectives of the Act.

In its appeal, which is now here, American makes the basic complaint that its own structure and right to exist should be passed upon, not viewing American simply as part of the Bond and Share system, from which American could readily be divorced, but as the key unit in its own holding company system. Section 11 of the Act contemplates that the Commission shall deal with "each" and "every" system.

Preliminary.

In the Government brief it is asserted at the outset and elsewhere that American accepts the Findings and Opinion of the Commission as "an agreed statement of facts" which American is not free to contest (Br., pp. 3, 21, 23, 35).

The fact is that in the interest of bringing to a close the proceedings before the Commission, which had lasted for more than two years, American merely waived further argument on the report submitted by the Commission, a large part of the report consisting not of facts or "findings" but of inference and argument.

That the Government's contention is completely without basis is shown by the Record and by the Commission's own statement. The stipulation between counsel for American and counsel for the Commission provided in part that American reserved "all legal and constitutional rights, including its right to full judicial review of the said findings, opinion and order" (R., Vol. II, 521). The Findings and Opinion of the Commission state, with reference to this stipulation, that it "recites that Respondents *do not acquiesce in the present findings and conclusion or in the order to be entered hereon,* and that they expressly reserve all legal and constitutional rights" (R., Vol. II, 528).*

Acquiescence by American in expediting the proceedings has no bearing upon this appeal, nor does the statement by American to its stockholders, not appearing in the Record, although stressed by the Government, that American did not then intend to appeal.

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* Italics within quoted matter have been supplied throughout this brief except as otherwise noted.

The Issue Framed by the Commission: Bond and Share.

Consideration of the Findings and Opinion and their treatment in the Government brief shows that dissolution of American was in fact ordered because of the alleged effect of American in the Bond and Share system.

The proceedings resulting in the order, entered August 22, 1942, were instituted by the Commission May 9, 1940, by notice and order entitled (R., Vol. 1, 27):

> *"In the Matter of Electric Bond and Share Company, American Power & Light Company"*—and other subsidiaries of Bond and Share.

By an order dated June 7, 1940, with reference to hearings in the proceeding, the Commission provided (R., Vol. 1, 66):

> "that such hearing shall be limited initially to the issue of *whether it is necessary to discontinue the existence of American Power & Light Company, Electric Power & Light Company * * * or any of them, in order to insure that the structure of the holding company system of Electric Bond and Share Company* shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of such system."

It was on the issue as so limited that the hearings were held before the Commission, the evidence taken and the Findings and Opinion and decree rendered.

The Government brief (pp. 17-18) calls attention to the fact that the order above quoted states that the hearings shall be so limited "initially". Notwithstanding this, the Record, as well as the Government brief, shows that the substance of the hearings never got beyond the issue as "limited initially". The decree of the Commission of course purported to dispose of American finally.

American: A Holding Company System by Itself.

What is completely minimized in the Government brief, as it was by the Commission, is that American is in itself a holding company system. American owns substantially all the common stock of sixteen subsidiary operating electric and gas utility companies, serving a population of 2,740,000 (R., Vol. II, 541-542). Some of these companies operate in only one state and the operations of others extend into two states.

American is a large company, with a capital of some $270,000,000, including approximately $46,000,000 of debentures and $177,000,000 of preferred stock, and some 3,000,000 shares of common stock, carried on its books, with surplus, at more than $47,000,000 (R., Vol. II, 537). American stands as an investment medium of some 45,000 public investors (R., Vol. II, 537; Tr. 1968); all its debentures, and 95½% of its stock are owned by the general public (R., Vol. II, 537-538). The utility companies whose common stock American holds in turn have outstanding approximately $311,000,000 of bonds and $110,000,000 of preferred stock, all held by the general public, except $4,700,000 of that preferred stock and some bonds held by American (R., Vol. II, 539-40; pp. 1, 3 of Ex. D to 1941 Form U5S of American; R., Vol. I, 262; R., Vol. II, 659, App. B-2).*

Bond and Share owns some preferred shares (51,840) and 937,221 common shares of American. This is less than 4½% of American's stock at book value. The Bond and Share holding carries 20.7% of the vote in American (R., Vol. II, 537-538).

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* The figures used above are those of December 31, 1941, the last year considered by the Commission, as set forth in the Findings and Opinion of the Commission.

This 4½% holding in American's stock, carrying over 10% of the vote, of course makes American and its subsidiaries a part of the Bond and Share system by statutory definition (Section 2(a)7-9 of the Act).

That fact, however, should by no means obscure the most pertinent consideration that American is an entity in itself. It has cumulative dividends in arrears, but stands as an eminently solvent and self-sustaining enterprise.

The Government states throughout, as did the Commission, that American is solely "an instrumentality for Bond and Share", for purposes of furnishing Bond and Share control over the subsidiaries of American (Govt. Br., pp. 9, 26, 73).

Yet at the same time the Government asserts that Bond and Share owns but a small fraction of the ultimate equity in American; that the bulk of the stock in American, all of its debt, and all the securities of the underlying companies, except their common stock, and some preferred stock and bonds owned by American, are owned by the public (Govt. Br., pp. 5, 41-43).

It by no means appears from the Findings and Opinion that American has no independent place and function in itself. The Government asserts that American was used "as a means of obtaining funds from the public" (Br., p. 9), yet maintains that American is to be dealt with not from the standpoint of the public so predominantly owning its securities, but from the standpoint of Bond and Share.

The Government statement as to the annual expenses of American, however, requires correction. The Government states (Br., p. 80), that the expenses of American in 1941 exceeded $1,000,000, citing page 634 of the Record. That page contains a statement by the Commission indicating such figure. When carefully examined, however, the Record shows that the expenses of American for 1941, including

taxes, were $764,480 (Annual Report to Stockholders for 1941, p. 10, Ex. F-1 to 1941 Form U5S of American). Taxes amounted to $366,778, which left the total expenses of American, excluding taxes, at $397,702. The tax item thus should not have been added to the expense total, as it was by the Commission and by the Government.

As against this expense, American cites the fact that through the combined holdings of the subsidiaries American effects savings in dividend payments amounting to probably $300,000 a year, savings in stock transfer taxes (which the Government omits to mention), and, through consolidated returns, net savings in taxes (Main Br., pp. 24, 83-84). While the Government objects to consideration of these tax savings (Br., p. 80), they have a natural bearing upon the interests of the security holders of American.

On the facts set forth in the Findings and Opinion, American contends that, although created by Bond and Share for Bond and Share's own purposes, American stands as a distinct holding company system, with 95½% of its stock in the hands of the public. Under the Act, American was accordingly entitled to its own day in court and was not properly disposed of by the Commission as a mere adjunct of Bond and Share.

All objection to *American in the Bond and Share system* through its 4½% of American's stock would be corrected by divestment by Bond and Share of its stock in American, a matter discussed below.

With regard to the Bond and Share aspect, it should be remarked also that the Record shows that while Bond and Share has 20.7% of the voting power in American, the public has 79.3%. It appears from the Record that in the last six years (1935-41) in stockholders' meetings of American, Bond and Share actually cast but 37% of the votes while the public stockholders cast 63% (R., Vol. II, 617).

There is thus no basis whatever for the insistence in the brief of the Government (*e.g.*, p. 25) that the public stockholders in American are "*disfranchised*". The public not only had, but actually exercised, dominant voting control over American. What the Commission complains of is not the voting *power* of the public, but the *voting attitude* of the public—a very different matter.

As directed to American, the Findings and Opinion are far from affording a substantial basis for a conclusion that in American voting power is unfairly or inequitably distributed, and that its own system is unduly or unnecessarily complicated.

As to the distribution of voting power between *stockholders of American*: the preferred stock always has a share for share vote (R., Vol. II, 537). The common stock of American has about 63% of the voting power in American (*id.*).

Statements made by the Commission (*e.g.*, R., Vol. II, 568) imply that the preferred stockholders should have a larger or preponderating vote, while dividends on that stock are in arrears.

There is no evidence that the preferred stockholders complained about this; indeed, the Record shows that a greater percentage of preferred stockholders than of common stockholders voted, and that they have voted regularly in favor of the present management (S. E. C. Exs. 49 and 49A; R., Vol. I, 201; Tr. 18156).

No standard of voting power would call for *destroying* the voting power of the preferred stock along with that of the common, because it was conceived that the preferred stock might have too little voting power.

As to voting power of American over its own subsidiaries, American owns substantially 100% of the common

stock of each of its subsidiaries (R., Vol. II, 541). American holds a small amount of the outstanding preferred stocks of some of its subsidiaries ($4,700,000 out of a total of $110,000,000; see p. 5, *supra*). Its common stock ownership in the subsidiaries carries with it, generally speaking, over 90% of the voting power in the subsidiaries (R., Vol. II, 541).

Taking into consideration both the preferred stocks and the common stocks of the subsidiaries and using book figures (as of December 31, 1941, the end of the last year prior to the closing of the hearings), American owns over $254,000,000 of the stocks, or over *69%* of the total stock equity in its subsidiaries (Main Br., p. 89). This financial interest of American in its subsidiaries, amounting to 69% and substantially all in common stocks, is such as amply to support American's having voting control over its subsidiaries.

As pointed out in our main brief (pp. 88-97), the Commission sought to reduce the financial interest of American in its subsidiaries to show that the financial interest was "attenuated" and disproportionate to its voting control. It was after setting forth such reducing computations that the Commission stated:

> "*On the basis of the foregoing figures,* it is apparent we must find that voting power is unfairly and inequitably distributed *among the security holders of the American system, and among the security holders of the American-Bond and Share system*: and that accordingly the continued existence and capital structure of American unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (R., Vol. II, 622).

The "foregoing figures" included figures which were not findings at all and also, as we maintain, fallacious com-

putations. This objection the Government now attempts to meet by stating that the Commission also included *book* figures as to which there was no dispute, and that the Opinion is to be treated as laying "greatest emphasis" on the book figures rather than on the computations considered, but not found (Govt. Br., pp. 47-48).

The Commission first introduced into these computations *bonds* of the subsidiaries. The suggested adjustment increased the amount of the total property interest to be considered by the amount of the bonds of the subsidiaries and reduced the percentage *property* interest of American in its subsidiaries, represented by stocks, from the apparent 69% to 41.67% (R., Vol. II, 619). We maintain that bonds do not ordinarily carry a vote, even in the current practice of the Commission. Their inclusion in estimating the interest of American, on which its vote is predicated, was erroneous.

Beyond this, the Commission attacked the book figures for the stock equity, seeking to show that these figures were excessive by reason of apparent write-ups and failure to make adequate provision for depreciation reserves. Such reductions carried the stock equity of American in its subsidiaries down to about $21,000,000, equivalent to 4.75% of the total property interest, including the bonds (R., Vol. II, 619-620, 665, App. E-2). In our main brief (pp. 89-95) we of course pointed out that the Commission made no *findings* regarding these values or as to such reductions. To our objection to the computations on which the Commission's conclusion was based, the Government's answer (Br., pp. 46-50) is that the Commission did not really consider these computations but acted on the basis of the book figures. That stands as pure assumption on the part of Government's counsel.

As to the question of *values* presented by the Commission's attack upon the equity of American in its subsidiaries, American made an extensive *offer of proof* (Main Br., pp. 97-101), the purpose of the evidence being to establish that actual values were as much as the book values. To our objection that this proof should have been received, the answer of counsel (Br., pp. 63-65) is that proof of values is material only when it comes to considering a plan for dissolution by distribution of securities, but is not material when it comes to ordering dissolution on the basis that the financial interest is not sufficient to warrant the voting power. It seems obvious, however, that the question of what the actual value is is highly pertinent in determining the propriety of voting power. This is clearly true unless the Government bases its objection to the distribution of voting power in American on past transactions by which voting power in American was established. But if Section 11(b)(2) is thus to be treated, it is invalid as an *ex post facto* law (Main Br., 85-88).

The Government (Br., p. 40) places reliance on the phrase "unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties", appearing in Section 1(b)(1) of the Act. Yet there is no indication that "asset values" as there used carries any meaning other than the ordinary meaning of asset values at the time when they are to be considered.

American in its main brief (pp. 95-96) pointed out that later events, reported in public documents from the Commission, indicate that the valuations, which in its computations the Commission had assigned to certain different items in American's holdings, show that the Commission's suggested values were out of line with the facts. In the Government brief it is maintained that the differences are

not material and amount only to not making the allowances for additional *depreciation* which the Commission had originally suggested (Br., pp. 51-53).

In the case of the Florida Power & Light Company, one of the three instances dealt with in this connection in our main brief, the Government points out that the amount of write-ups assumed in the Findings and Opinion was $36,883,684, whereas the amount for write-ups ordered by the Commission to be disposed of or reserved for in later proceedings was $31,433,494; and that in the case of The Montana Power Company the amount indicated in the Findings and Opinion was $57,000,000, whereas the amount ultimately ordered by the Commission to be disposed of or reserved for in later proceedings for "write-ups" was $46,891,597 (Govt. Br., p. 60). These differences are not to be treated as inconsiderable.

In addition, however, it appears that the Commission in the later proceedings did not insist upon taking into account the *additional depreciation reserves* which had been suggested in the Findings. The amount of such reserves which the Commission had hypothetically referred to in the Findings and Opinion was nearly $100,000,000 (R., Vol. II, 665, App. E-2, Col. (11)). It follows that if such additional reserves are not to be taken into account, the write-down suggested in the Findings and Opinion was excessive by that amount.

In the case of the Nebraska Power Company stock disposed of by American on December 26, 1944 for $14,000,000, it remains true that the Commission showed for that property a minus figure of $2,463,808. The Government does not dispose of this difference by stating (Br., pp. 59, 62) that the Commission did not pass upon the sale price of this stock.

As appears from what is discussed above and in our main brief (pp. 88-97), the Commission proceeded, at least in part, on the basis of hypothetical and fallacious figures so far as it determined that voting power "among the security holders of the American system" is unfairly and inequitably distributed. The order must therefore be reversed on this ground alone, even if it is possible that the Commission would have reached the same conclusion on other grounds. See *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 510 (1935); *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95 (1943); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532-535 (1945).

As to complication in American's structure in and of itself, the Government brief indicates little substance for the conclusion of the Commission.

The security structure of American is a familiar one, with debentures, preferred stock and common stock. The preferred stock is in arrears (R., Vol. II, 537), but that in itself is hardly a complication. Certainly, it is not one that cannot be cured by familiar corporate steps.

The argument of the Government (Br., p. 70) is focused on the contention that American has no "useful economic function", and that this in itself makes American an unnecessary complication. The Government urges, as did the Commission, that American does not "service" its subsidiaries; that its subsidiaries have executive staffs of their own and could call on the servicing facilities of Ebasco for outside help (Govt. Br., pp. 84-85). One might infer from the Act that the fact that a holding company does not "service" its subsidiaries is a virtue rather than a defect.

What the Government says in its brief about contributions of cash or securities by American to its subsidiaries with the result of improving their "stock equities" (pp. 110-114) indicates the importance of American to its subsidiaries and its stockholders.

American is by no means to be judged useless because of what it *does not do*. American is in itself an investment trust, holding diversified investments in public utility companies, affording stockholders the opportunity for convenient diversification and the means of substantial economies in reference to their diversified holdings. While American does not "service" subsidiaries, it obviously supervises investments.

American has a Board of Directors, including representatives of large public holdings of its preferred stock (Annual Report of American for 1941, Ex. 2 to Form U5S for 1941; R., Vol. I, 269, 281); it has a staff adequate to watch over its investments, to choose local managements through ownership of the voting stock of its subsidiaries, to determine whether the local managements are satisfactory.

In the matter of *complication*, the Government (Br., pp. 70-73) falls back on the effect of American in the Bond and Share system on voting control, a matter which of course would be cured by divestment.

The Government argues (Br., p. 79) that complication exists because a stockholder in a public utility holding company to appraise his stock must inform himself as to the underlying stocks owned by the holding company. Yet this consideration applies with no more force to a public utility holding company than to the general run of investment trusts. These of course are regulated under the Investment Company Act and are by no means prohibited.

II.

The Government brief does not show that dissolution of American was the proper or justifiable remedy to accomplish the purposes of the Act.

Apart from the attacks on Bond and Share, the weight of what is said in the Government brief is directed to the argument that in the situation of American, conceived by the Commission to be a mere "instrumentality" or "tool" of Bond and Share, "The Commission's choice of dissolution was an eminently fair and practical solution to a complex administrative problem" (Br., p. 28).

That this should be elaborately argued by the Government is natural as it is so obvious that the apposite remedy was simply to order that Bond and Share divest itself of its holding of the 4½% of American's stock, or have the stock trusteed for voting, or withheld from voting. As to the possible use of the remedy of divestment, the Findings and Opinion are completely silent (R., Vol. II, 635-636). The Commission had apparently confined its thought to the remedy of dissolution.

American of course contends that before resorting to the radical step of dissolution, the plan of reorganization submitted to the Commission in the course of the proceedings should have been considered by the Commission (Main Br., pp. 101-107). Nothing in the Government brief on that point tends to show that refusal to consider the plan avoided the necessity of consideration by the Commission of the matters ultimately involved in the plan. The steps there involved have as much bearing in dissolution as in reorganization.

It is the position of the Government (Br., p. 95) that the choice of remedy comes down merely to a question of "administrative competence."

However, the choice of remedy was not a mere matter of convenience for the Commission. It vitally affects substantial rights. The remedy selected by the Commission visits all the weight of correction on American and its security holders, not on Bond and Share. Familiar considerations require that the remedy chosen be such as to cause the minimum of damage.

As this Court recently said:

> "We must assume that Congress intended to exercise its power with the least possible harm to citizens" (*Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 638 (1945)).

The Government makes the argument (Br., pp. 124-127), not advanced by the Commission, that divestment by Bond and Share would have been *impracticable* because (1) Bond and Share, without revamping its capitalization, might not be able to distribute the stock of American to its own stockholders, and (2) the stock of American might not be in form to distribute until internal changes in American had been effected.

Yet it is clear that before finishing with Bond and Share under the Act, the Commission would have to deal with ordering of the affairs of that company. Indeed the Commission has commenced a proceeding, now pending, to break up the balance of the Bond and Share system (Holding Company Act Release No. 4305, May 19, 1943). And Bond and Share has itself commenced a proceeding before the Commission to divest itself of its holdings in its two remaining subsidiaries (Holding Company Act Release No. 5970, August 6, 1945).

It also appears from what is said in the Government brief (pp. 106-109) that before American could be finally dissolved on the Commission's order, internal adjustments within the American system and in its capital structure would have to be made.

It might appear from statements made from time to time in the Government brief (pp. 32, 120-122, 140) that American is far along the road to dissolution. When the various steps referred to, which were taken by American in the interests of its security holders, are considered, it still appears that the large majority of its holdings remain, some of them in revised form.

No reason appears why all the steps necessary to put the companies in shape for final action could not be taken before the action was had. The difficulties which the Government suggests in divestment by Bond and Share are no greater than the difficulties with the remedy of dissolution. The mandate of the Commission under the Act was simply to proceed "as soon as practicable", exercising its power with a view to the least possible harm. The Commission could have postponed divestment by Bond and Share until the time when it was thought appropriate, and have provided that in the intermediate period Bond and Share should not vote its stocks in American, thus putting an end to the voting power of Bond and Share in American.

No Power of Dissolution.

The Government does not meet the argument that the statute does not authorize dissolution.

It is clear that Section 11(b)(2) does not do so in terms (Main Br., 109-113). The Court below refused to consider this lack of authority on the ground that it was not raised before the Commission (R., Vol. IV, 875). Counsel for the Gov-

ernment do not make this contention seriously in their brief. They say (p. 154) only that the motion paper we quote in our main brief (p. 108) was in "vague and general language", and that we did not give it the full treatment we gave other points. We were not required by Section 24(a) to make a detailed argument to preserve the point.*

The Government brief maintains that the deletion of the word "dissolution" in Section 11(b)(2) in the course of the enactment of the statute was merely intended to leave the remedy discretionary with the Commission. It attempts to overcome the compelling inference from the deliberate deletion of a provision for "dissolution"—the focal point of the objections of the House—by reference to speeches of members of the House, grammatical interpretations of the general language of the Section, references to Section 1, and citations of decisions of the Commission holding that it has power to dissolve (Govt. Br., pp. 156-165).

This Court has long held that statements of Congressmen have no weight in construing an Act, against the implication from Congressional actions (Main Br., pp. 112-113).

Grammatical discussion of the general language of the Act, not mentioning dissolution, does not overcome deliberate deletion by Congress of the specific word "dissolution".

As stated in our main brief (p. 54, footnote; p. 112) Section 1 has been conceded by the Commission not to be operative to limit Section 11.

Certainly the Commission's assumption of power of dissolution is not determinative on this point. An administra-

* References of Government counsel (p. 156) to descriptions of Section 11(b)(2), in briefs in other cases to which American has been a party, as a "death sentence" and as requiring dissolution are beside the point. These characterizations were obviously of the Section as construed by its proponents.

tive agency cannot take a drastic power to itself by its own decisions over the plain intent of Congress. As this Court said in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 616 (1944):

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

The Government does not meet the argument that the Court below was in error in failing to consider this objection. If it could be assumed that the objection was not made by American to the Commission in sufficient detail, nevertheless it appears that there were "reasonable grounds for failure so to do" within the provision of Section 24(a) of the Act, and the stipulated reservation of all legal and constitutional rights expressly accepted by the Commission obviated the necessity of more detailed objection. The reason was, as the Government concedes, that the Commission had already assumed to exercise power of dissolution. Certainly there is nothing to indicate that the Commission would have reversed itself had the Commission been called upon by American, as the Government now suggests, to re-examine the question (Govt. Br., pp. 154-155).

III.

The Government does not meet the argument that Section 11(b)(2) is unconstitutional.

This section, providing for divestment and simplification in structure, is a wholly novel provision and presents new constitutional issues. In the Act Congress fully provided for *regulation* of all future activities of public utility holding companies. The sections of the Act providing for detailed regulation, which do not appear in the Govern-

ment's brief, are Sections 6-10, 12, 13 and 15 of Title I, and Title II. The added remedy, looking to the taking apart of structures lawfully put together, entered new territory. And the path into that territory was not laid out in the statute.

(A) The difficulties with the Act under the Interstate Commerce provision are not met by the Government brief.

What those difficulties are is set forth in our main brief (pp. 45-60); Section 11 is not expressed in the statute as applying or limited to interstate commerce; no findings by the Commission that such commerce is affected by the existence or structure of American were made or required by the Act.

A reading of the Act as a whole suggests that the underlying theory was that once a holding company was registered under the Act, all provisions of the Act could be applied to it, but in the *Bond and Share* case, 303 U. S. 419 (1938), in accordance with the argument of the Government, the Court expressly held that the registration provisions were separable, leaving the other provisions to be considered on their merits.

What the Government appears to rely upon in the brief (p. 141) is that American is itself a "typical interstate holding company". The question, however, is not as to what American is, but as to what the Act does. The failure of the Act to specify that its application should be to practices or states of facts deemed to affect interstate commerce is not saved by the "separability clause" (Section 32). There was no finding by the Commission that the existence of American affects interstate commerce.

(B) The Government does not show that dissolution is not a taking or that the taking does not involve damage.

The basis of this we have shown in our main brief (pp. 24-40). The Government can hardly be said to argue that dissolution of a corporation does not involve a taking. What is involved in dissolution is not to be minimized by describing the operation as the mere "peeling off of a corporate shell" (Govt. Br., p. 105). Nor does the Government meet the constitutional difficulty as to the absence of provision for giving security holders the right to notice and a hearing, which is involved here (Main Br., pp. 40-43). The Government does not meet the argument that the principle of the *Radford* decision is here controlling.

The argument of the Government in the brief is that the taking involved in the dissolution of American will not cause any damage to the corporation or to its security holders—who have not been given the right to notice and a hearing—and will in fact benefit them. An article from a financial journal is quoted (Br., pp. 146-147), maintaining that when the affairs of holding companies are settled and securities distributed, security holders will find that they will have in value an amount greater than the value of the holding company securities.

This prediction is hardly an argument. It obviously rests upon the consideration, as stated in the journal cited, that holding company securities are "in bad repute"—due in no small measure to the Act. It is obvious from facts and common knowledge that the change in valuation of these securities and underlying securities results in large measure from recent economic and market trends.

The issue as to damages presented here is entirely different from the issue presented by the assertion, in an action

of contract, of the right of a holder of bonds of the United States to be paid in gold, instead of in currency as provided in the bonds, after the use of gold coin had been lawfully restrained, the resulting situation of the currency being such that the bondholder had not proved loss by the change in the medium of payment (*Perry v. United States*, 294 U. S. 330 (1935)).

The controlling point here is that the proposition that a corporation can be forcibly dissolved without damage to itself or to its security holders is not a proposition of law. It is a proposition of fact. On this the corporation and its security holders were certainly entitled to a hearing and determination. No such proceeding is provided for by the Act. To hold that they were not so entitled would be "fictionalizing 'just compensation' ", so recently condemned by the Court in *United States v. General Motors Corporation*, 323 U. S. 373, 381 (1945).

(C) The Government does not meet the argument that the statute fails to establish standards for administrative action.

It is clear that however great the evils of public utility holding companies were considered to be, Congress could not leave it to a Commission, in so many words, to tear them apart or dissolve them as the Commission should see fit. The question is how far short is the provision here of such a clearly unconstitutional delegation.

The activating phrases for procedure under this section are "unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure". But the section appears to leave wholly open the question of how the vote or the complication of structure is to be corrected. This would mean that under the Act, as construed

by the Commission, the Commission could, for example, choose either to decree the dissolution of a sub-holding company, with the damage that this involves to the sub-holding company and its security holders, or to decree divestment of the sub-holding company stock by the parent, visiting any damage on that company and its security holders.

We have pointed out in our main brief that the activating phrases are nowhere defined in the statute (pp. 60-61). We have also pointed out that they have no accepted legal or commercial meaning (Main Br., pp. 60-70).

Of course the term "fair and equitable" has a recognized legal meaning as applied to the distribution of property interests. It is in this connection that "fair and equitable" is used in Section 11(d) and 11(e). That meaning —of conforming as nearly as may be to pre-existing relations—is wholly different from the meaning in which the phrase "unfair or inequitable" is employed in Section 11(b)(2)—which implies change in the established relation. We pointed out that the Commission has made no attempt to define these phrases, but has proceeded on a case to case basis, and that this is eminently true in the Findings and Opinion here. The Commission has not made "the inquiry envisioned by Section 11(a)" referred to in the Government's brief (p. 149), through which Congress seemed to contemplate something other than case to case procedure.

Counsel for the Government refer (Br., p. 152) to *National Broadcasting Company* v. *United States*, 319 U. S. 190 (1943). But there, under the Federal Communications Act the Federal Communications Commission did just what the Commission has not done here. It set up a general standard and regulations for the entire industry according to the "public interest", prior to taking any

action on the application of any party. This Court has expressly held that the "public interest" carries a well-defined meaning through a long series of decisions—a situation exactly contrary to that surrounding Section 11(b)(2). It seems probable that some setting up of a general standard is what was contemplated by Congress in Section 11(a).

The answers to the vital lack of any clear and objective standards in Section 11(b)(2) are remarkable.

The Government falls back on the suggestion that American ought not to object to the lack of standards in the Act, as the president of one of the companies in the Bond and Share system had testified before a Congressional committee that the Commission should not be placed "in a straight-jacket" (Govt. Br., pp. 150-151). Any suggestion by a corporate executive can hardly justify delegation by Congress of arbitrary power.

The other branch of the Government's answer is that the meaning of the wholly general and substantive phrases is to be gleaned from the reports of the Federal Trade Commission and committees which preceded the adoption of the Act, and from study of what is going on in the bankruptcy reorganization cases (Govt. Br., pp. 149-150).

Clearly phrases in a statute which are used as a basis for destroying a company and vitally affecting the interests of security holders should be sufficiently clear so that those affected would know their rights without having to make a guess as to what is the effect of the voluminous set of reports.

Looseness in standards to be applied by public officers in passing on affirmative action sought to be taken by private interests is one thing. Absence of standards for the tearing down by public authorities of a structure of ownership,

lawfully created, of a lawful business, is a very different thing.

As the statute stands, it presents a clear case of "delegation running riot" (295 U. S. 495, 553).

The orders of the Commission appealed from should be set aside in all respects.

Respectfully submitted,

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